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OPINION	:	No. 84-1105
	:	
of	:	<u>DECEMBER 28, 1984</u>
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THE HONORABLE HENRY G. MURDOCK, DISTRICT ATTORNEY,
ALPINE COUNTY, has requested an opinion on the following questions:

1. May a deputy sheriff of Alpine County simultaneously hold the office of county supervisor of that county?
2. If the answer is "no," would a waiver of one of the salaries of the two positions cure the legal prohibition?

CONCLUSIONS

1. A deputy sheriff of Alpine County may not simultaneously hold the office of county supervisor of that county.
2. A waiver of one of the salaries of the two positions would not cure such legal prohibition.

ANALYSIS

A deputy sheriff in Alpine County was elected to the office of county supervisor of that county. We are asked:

(1) whether these two positions may be held simultaneously; and

(2) if not, whether the waiver of one of the salaries of the two positions would cure the legal prohibition.

Neither the state constitution nor any state statute specifically sanctions the simultaneous holding of these two positions, nor has such been specifically sanctioned by local ordinance.¹

There is no question that a county supervisor holds a public office. (See Gov. Code, § 25000 et seq.) A deputy sheriff also holds a public office, both in his capacity as a deputy to a county officer and as a peace officer. (See Gov. Code, §§ 24000, subd. (b), 24100-24104, 7, 1194; *People v. Woods* (1970) 7 Cal.App.3d 382, 387 (deputy sheriff has "all powers possessed by the sheriff"); *Nigel v. Superior Court* (1977) 72 Cal.App.3d 373, 378, and cases cited, (policeman held to be public officer).)

Accordingly, we examine the questions presented in the context of the common law rule prohibiting the simultaneous holding of incompatible offices. In 66 Ops.Cal.Atty.Gen. 176 (1983), wherein we concluded that the offices of fire chief of a county fire protection district and member of the board of supervisors were incompatible, we discussed the common law doctrine as follows:

"Offices are incompatible, in the absence of statutes suggesting a contrary result, if there is any significant clash of duties or loyalties between the offices, if the dual office holding would be improper for reasons of public policy, or if either officer exercises a supervisory, auditory, or removal power over the other." (38 Ops.Cal.Atty.Gen. 113 (1961).)

"(See also, generally, *People ex rel Chapman v. Rapsey* (1940) 16 Cal.2d 636, 641-642, and e.g. 65 Ops.Cal.Atty.Gen. - (1982), Opn. No. 82-

¹ It is and has been clear for many years that the Legislature may permit the simultaneous holding of incompatible offices. (See *American Canyon Fire Protection Dist. v. County of Napa* (1983) 141 Cal.App.3d 100, 104; *McClain v. County of Alameda* (1962) 209 Cal.App.2d 73, 79.)

Recently, this office concluded that a county and a chartered city could also provide for the simultaneous holding of incompatible offices. (See 66 Ops.Cal.Atty.Gen. 293 (1983).)

901; 64 Ops.Cal.Atty.Gen. 288, 289, (1981); 64 Ops.Cal.Atty.Gen. 137, 138-139 (1981); 63 Ops.Cal.Atty.Gen. 623 (1980); 63 Ops.Cal.Atty.Gen. 607, 608 (1980).)

"The policy set forth in *People ex rel Chapman v. Rapsey*, *supra*, 16 Cal.2d 636 comprehends prospective as well as present clashes of duties and loyalties. (See 63 Ops.Cal.Atty.Gen. 623, *supra*.)

". . . Neither is it pertinent to say that the conflict in duties may never arise, it is enough that it may, in the regular operation of the statutory plan. . . ' (3 McQuillin, *Municipal Corporations* (3d Ed. 1973, 12.67, p. 297).'

"[O]nly one significant clash of duties and loyalties is required to make . . . offices incompatible. . . ' (37 Ops.Cal.Atty.Gen. 21, 22 (1961).) Furthermore, '[t]he existence of devices to avoid . . . [conflicts] neither changes the nature of the potential conflicts nor provides assurance that they would be employed. (38 Ops.Cal.Atty.Gen. 121, 125 (1961).) Accordingly, the ability to abstain when a conflict arises will not excuse the incompatibility or obviate the effects of the doctrine. A public officer who enters upon the duties of a second office automatically vacates the first office if the two are incompatible. (*People ex rel. Chapman v. Rapsey*, *supra*, 16 Cal.2d 636, 644.) Both positions, however, must be offices. If one or both of the positions is a mere employment as opposed to a public office, the doctrine does not apply. (See 58 Ops.Cal.Atty.Gen. 109, 111 (1975).)' (*Id.*, at p. 177.)

Applying the foregoing principles to the offices of county supervisor and deputy sheriff in the same county, it is patent that the offices are incompatible. First of all, the board of supervisors is required to "supervise the official conduct of all county officers . . . [and] shall see that they faithfully perform their duties." (Gov. Code, § 25303.) Furthermore, with respect to the sheriff, "[t]he board may direct the sheriff to attend, either in person or by deputy, all the meetings of the board, to preserve order, and to serve notices, subpoenas, citations, or other process, as directed by the board." (Gov. Code, § 25206.) And in Alpine County, we are advised that the board of supervisors has retained the power to both appoint and remove all county employees, which would include deputy sheriffs. (See generally, Gov. Code, § 25300.) Thus, the office of county supervisor exercises "supervisory, auditory, or removal power" over the office of deputy sheriff.

Additionally, there is a significant clash of duties and loyalties between the two positions which dictates that they not be held by the same person simultaneously. The board of supervisors determines the budget for all county departments, including the

sheriff's department. (Gov. Code, § 29000 et seq.) In Alpine County, it also has entered into a Memorandum of Understanding (MOU) with the Alpine County Employees Association. Such MOU determines in detail the terms and conditions of employment of all county employees, including deputy sheriffs. Although the present MOU is automatically renewed from year to year, it is still subject to modification. (MOU, Section 15.) A perusal of the MOU also demonstrates that a number of provisions therein relate specifically to the sheriff's department. (E.g., shift assignment, overtime and uniform allowance.)

A member of the board of supervisors who is also a deputy sheriff clearly would have a conflict if he, as a board member, were to attempt to deal with matters that would affect him as an employee or that would affect the sheriff's department. And, as noted in the general principles discussed above, "the ability to abstain when a conflict arises will not excuse the incompatibility or obviate the effects of the doctrine." As cogently stated in a strikingly similar case in a sister jurisdiction wherein the court held that a city policeman could not simultaneously hold the office of village trustee by virtue of the common law prohibition:

"The Board of Trustees of the Village of Tinley Park must determine the salaries and fringe benefits of all village employees, including police officers. It must annually establish an operating budget for the village's police department and for all village departments and must annually levy taxes for various police purposes. It must authorize expenditures for various equipment and supply purchases for the police department and approve of officers attending seminars, conventions and supplemental training.

"The Civil Service Commission of the village is responsible for the hiring and firing of police officers, but the Board of Trustees has extensive and wide-ranging responsibilities in the field of police department labor relations and personnel decisions.

"The Board has the duty and responsibility of increasing or decreasing the numerical strength of the police department. Recently it voted to reduce the number of officers in the department. The Village President and Board of Trustees, not the Civil Service Commission, has the authority to appoint and remove the Chief of Police, the head of the department of police to which Rogers belongs. The Board also has the authority, by ordinance, to appoint and remove the Civil Service Commissioners or change the composition of the Commission.

"Rogers is a member of the Tinley Park Patrolmen's Association, a collective bargaining unit representing many members of the police department. There have been labor disagreements and serious negotiations between the Board of Trustees and the Association. The village has entered into a collective bargaining agreement with the Association as the exclusive bargaining agent for all village patrol officers. This agreement is subject to implementation and negotiation between the Board and the Association and expires during Rogers' present term of office as trustee.

"Plaintiff contends, however, that any conflict between the positions of police officer and village trustee can be avoided by his not participating in any action involving the police department. We disagree."

(*Rogers v. Village of Tinley Park* (Ill.App. 1983) 451 N.E.2d 1324, 1329.) The same basic considerations and reasoning are applicable herein.

Furthermore, it would seem beyond cavil that a member of a board of supervisors could not also be the sheriff of the same county. Unless abrogated by statute, the same disabilities in this respect would apply to a deputy as well as to his principal. (63 Ops.Cal.Atty.Gen. 710, 712-716 (1980); compare Gov. Code, § 1128.)

Accordingly, we conclude that the common law rule prohibiting the holding of incompatible offices prohibits the simultaneous holding of the offices of deputy sheriff and member of the board of supervisors of the same county. Since there appears to be no abrogation of this rule in Alpine County with respect to these two positions, the common law rule is still applicable.²

The second question presented assumes the above conclusion and asks whether the waiver of the salary of one of the offices would cure the incompatibility. We faced this precise question in 66 Ops.Cal.Atty.Gen. 176, *supra*, with respect to the offices

² An additional reason these positions should not be held simultaneously is provided by Government Code section 1090, prohibiting contractual conflicts of interest. (See generally, 65 Ops.Cal.Atty.Gen. (1982) 305 and at fn. 4.)

Although in the just cited opinion we applied the "doctrine of necessity" to avoid the strictures of section 1090, the same considerations are not applicable here. That case involved a superintendent of schools who married a school employee and passed upon her MOU. It involved the rights of two individuals who were legally holding public positions and their constitutional right to marry. There, however, is no constitutional right to hold two incompatible offices. (See 63 Ops.Cal.Atty.Gen. 710, 716-718), *supra*; see also *Rogers v. Village of Tinley Park*, *supra*, 451 N.E.2d at p.1331; Cf. *Clements v. Fashing* (1982) 457 U.S. 957.)

of fire chief of a county fire protection district and member of the board of supervisors of the same county. We stated as follows in response to the question whether waiver of salary as fire chief or acting merely as an uncompensated volunteer firefighter would cure the incompatibility of office problem:

"Thus, we conclude that the supervisor-fire chief may not become a volunteer fire chief in the sense that he is no longer a public officer and an officer of the fire district. Such conclusion, however, would not preclude the chief from waiving his salary if he desired to do so. (See *Scott v. City of Los Angeles* (1948) 85 Cal.App.2d 327; *Gamble v. City of Sacramento* (1941) 43 Cal.App.2d 200; *Huntsman v. Board of State Harbor Commissioners* (1936) 17 Cal.App.2d 749; 40 Ops.Cal.Atty.Gen. 54 (1962); Atty.Gen.Unpub. Opn. I.L. 75-141.) *However, mere waiver of salary by contract with his appointing authority would not transmute him into a volunteer, that is, into a private citizen.* (See 51 Ops.Cal.Atty.Gen. 125, 127 (1968); 29 Ops.Cal.Atty.Gen. 211; *supra*, volunteer firemen generally not employees of the public entity.) *He would still be an officer of the district. Accordingly, a waiver of salary would not cure the incompatibility of office problems.* (*Id.*, at p. 181; emphasis added.)

(*Cf. Rogers v. Village of Tinley Park, supra*, 45 1 N.E.2d at p.1331: "a leave of absence [as policeman] does not remove the incompatibility.")

Accordingly, we also conclude herein that the waiver of one of the salaries by a deputy sheriff who simultaneously sought to be a county supervisor would not cure the legal incompatibility of the two public offices.
